

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANCE CHARLES HICKS,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2007

No. 266510

Wayne Circuit Court

LC No. 05-007825-01

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree criminal sexual conduct, MCL 750.520c (multiple variables), and sentenced to 10 to 15 years' imprisonment. He appeals as of right. We affirm in part, vacate in part, and remand for resentencing and for reconsideration of the order requiring defendant to reimburse the county \$1,370 in attorney fees.

Defendant's conviction arises out of the sexual assault of his daughter who was 13 years old at the time of trial. The victim testified about multiple instances of sexual abuse that began after she moved in with defendant in 1998, when she was six or seven years old. She recalled that the first incident involved defendant touching her face with his penis while she was lying on a bed watching a movie. The victim recalled another incident in which she was lying on the floor, and defendant rubbed her chest, vagina, and buttocks before attempting to penetrate her vagina with his finger. She also testified that, on multiple occasions, defendant performed oral sex on her and attempted to have vaginal intercourse with her. The prosecutor charged defendant with three counts of first-degree criminal sexual conduct, MCL 750.520b (multiple variables), and three counts of second-degree criminal sexual conduct. At trial, defendant denied ever sexually assaulting the victim. The jury convicted him of one count of second-degree criminal sexual conduct and acquitted him of the remaining charges.

Defendant first argues that the trial court denied him a fair trial by admitting irrelevant and prejudicial prior bad acts evidence under MRE 404(b). We disagree. This Court reviews the admission of other acts evidence at trial for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado, supra* at 388; *Babcock, supra* at 269. "A

decision on a close evidentiary question ordinarily cannot be an abuse of discretion.” *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

MRE 404(b)(1) governs the admission of prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant under MRE 402. *Id.* Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

In this case, the trial court admitted evidence of defendant’s prior sexual abuse of the victim’s half-sister on the basis that the evidence was relevant to show absence of mistake as well as defendant’s state of mind, intent, and plan or scheme. Defendant contends that this evidence was irrelevant to show absence of mistake because his theory of defense was that the conduct did not occur, not that it occurred as a result of a mistake or accident or that the victim mistakenly interpreted innocent contact.

Defendant relies on *People v Sabin (After Remand)*, 463 Mich 43, 69; 614 NW2d 888 (2000), in which our Supreme Court held that similar evidence was inadmissible to show absence of mistake when the defendant’s theory of defense was not that the victim mistakenly perceived his actions, but rather, that the incident did not occur. Like this case, the victim in *Sabin* was the defendant’s daughter, and the other acts evidence involved the defendant’s sexual assaults of his stepdaughter. *Id.* at 47, 49-50. Also, in *People v Pesquera*, 244 Mich App 305, 319-320; 625 NW2d 407 (2001), this Court held that other acts evidence involving inappropriate sexual contact was not logically relevant to show absence of mistake or accident when the defendant did not argue that the victims misperceived his actions or that any improper contact was accidental. In that case, the defendant’s theory of defense was that the victims had been coached into fabricating the charges. *Id.* at 319.

Here, defendant’s theory of defense was fabrication, and defendant repeatedly denied ever touching the victim in an inappropriate manner. Thus, as in *Sabin* and *Pesquera*, because defendant’s defense was that the charged conduct did not occur, the other acts evidence was not relevant to show absence of mistake or accident. Accordingly, the trial court abused its discretion by admitting the evidence on this basis.

However, contrary to defendant’s position, we conclude that the evidence was admissible to show a common scheme or plan because the uncharged conduct is sufficiently similar to the charged conduct. “[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *Sabin, supra* at 63 (footnote omitted). In *Sabin, supra* at 66, our Supreme Court relied on the following factors in determining that the charged and uncharged conduct was sufficiently similar to uphold the admission of the other acts evidence: (1) the existence of a father-daughter relationship, (2) the ages of the victims, and (3) the fact that the defendant “played on his daughters’ fear of breaking up the family to silence them.”

There are similarities between this case and *Sabin*. There existed a father-daughter relationship between defendant and both the victim and her half-sister. Although defendant was not the half-sister's father, he lived with her and her mother and acted as the male head of the household at the time the abuse occurred. Both the victim and her half-sister were similar ages when the abuse began. The victim testified that the sexual assaults began when she was six or seven years old. Similarly, her half-sister testified that defendant began sexually assaulting her when she was approximately four years old. Moreover, regarding both girls, defendant threatened harm if they told anyone of his actions. The victim's brother testified that the victim had told him not to tell anyone about the abuse because defendant would hurt her "real bad" if defendant found out that she had told somebody. Likewise, when the victim's half-sister threatened to tell her mother about the abuse, defendant told her that she would never see her mother again and that her mother would get hurt. Considering these similarities, we conclude that the trial court did not abuse its discretion by admitting the other acts evidence to show defendant's intent, plan, or scheme.

Defendant contends that because the trial court instructed the jury not to consider the other acts evidence "for any other purpose" than to determine whether he acted purposely and not by accident or mistake, it is inappropriate to consider alternative theories of admissibility on appeal. As this Court stated in *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005), however, we are not bound by the trial court's reasoning in admitting evidence and will not reverse a trial court's correct result even if reached for the wrong reason. Moreover, although the trial court's limiting instruction addressed only absence of mistake or accident, the court also admitted the other acts evidence to show defendant's intent, plan, or scheme, and the evidence was properly admitted for that purpose. Defendant does not argue that the trial court erred by failing to include this purpose in its limiting instruction.

Defendant further argues that the prejudicial effect of the evidence far outweighed its probative value. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case, the probative value of the other acts evidence was relevant to the victim's credibility and to rebut defendant's theory that the allegations were fabricated. Thus, the evidence was not merely marginally probative, but was probative of the ultimate issue, i.e., whether defendant committed the offenses alleged. See *Sabin, supra* at 71. Further, the trial court's limiting instruction directed the jury not to consider the evidence as showing that defendant is a bad person or that he acted in conformity with his previous conduct. Such an instruction generally protects a defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Therefore, the trial court did not abuse its discretion by determining that the prejudicial effect of the evidence did not substantially outweigh its probative value.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to object to testimony that defendant physically abused his children. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, this Court's review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). " 'Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.' " *Id.*, quoting *People v LeBlanc*, 465 Mich 575,

579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Moorer, supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

During trial, the victim testified that defendant sometimes hit and punched her, and her brother testified that defendant used to choke him, hit him, and pick him up and throw him down. Defendant contends that this testimony was inadmissible under MRE 404(b), highly prejudicial, and served no tactical purpose. Contrary to defendant's argument, there was a sound strategy reason for not objecting to the testimony. The testimony supported defendant's theory that the charges were fabricated because of hostility toward him. The allegations of physical abuse provided a motive for the victim to fabricate the charges at issue in this case. Therefore, defendant has failed to overcome the presumption that defense counsel's failure to object constituted sound trial strategy. *Toma, supra* at 302. Moreover, defendant has failed to show prejudice. Considering that the jury acquitted defendant of five of the six charges, he has failed to demonstrate a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *Moorer, supra* at 75-76.

Defendant next contends that he is entitled to resentencing because the trial court failed to articulate substantial and compelling reasons to support its upward departure. In reviewing a departure from the sentencing guidelines range, we review the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *Babcock, supra* at 264-265. We also review the extent of a departure for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Under MCL 769.34(3), a trial court may depart from the sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." A substantial and compelling reason must be objective and verifiable, must "keenly" or "irresistibly" grab the court's attention, and must be recognized as being "of considerable worth" in deciding the length of a sentence." *Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The "objective and verifiable" requirement "mean[s] that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Abramski, supra* at 74. Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Abramski, supra* at 74.

The trial court departed from the sentencing guidelines range of 29 to 57 months, stating in pertinent part as follows:

There are three reasons the Court's going to depart. The first reason is the nature of the offense, including the nature of the injuries to the victim.

Two, the vulnerability of the victim, including the circumstances surrounding the commission of the crimes, the age of the child and the extent of the trauma or the psychological effect on this young child and more importantly, third, the need to protect society in light of the circumstances of the crime[.]

Regarding the victim's vulnerability, the trial court stated on the sentencing departure form:

1. Lack of adequate weight given to OV 10. The defendant exploited several vulnerabilities—youth, domestic relationship and authority status.

Defendant argues that exploitation of the victim's vulnerabilities was already accounted for in OV 10. Defendant was assessed 15 points under OV 10 because predatory conduct was involved. OV 10 also allows the assessment of ten points if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). Because defendant was assessed the higher number of points, i.e., 15 points, under OV 10 for predatory conduct, his exploitation of the victim's vulnerabilities was not taken into account at sentencing. Thus, the trial court correctly determined that exploitation of the victim's vulnerabilities was not taken into account and opined that proper weight was not accorded OV 10.

The trial court also departed from the guidelines range because of the nature of the offense, including the nature of the victim's injuries, and the need to protect society. The prosecutor concedes that these reasons are not substantial and compelling and that resentencing is required because it is unclear whether the trial court would have departed to the same extent on the basis of the inadequate weight given to OV 10 alone. See *Babcock, supra* at 260. We agree. We therefore remand this case to the trial court for resentencing. Consequently, we need not address defendant's argument that his ten-year minimum sentence is disproportionate.

Defendant also contends that resentencing is required because his sentence was increased based on facts that were not proven beyond a reasonable doubt contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Having already determined that defendant is entitled to resentencing, we note that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Defendant also argues that the trial court erred by ordering him to reimburse the county \$1,370 in attorney fees. The prosecutor concedes that the trial court's reimbursement order should be vacated and this case remanded to the trial court to reconsider its order in light of defendant's current and future financial circumstances. In ordering a defendant to reimburse a county for attorney fees, a trial court must, at a minimum, indicate that it has considered the defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). Here, the trial court made no mention of reimbursement, and the record indicates that the court's clerk merely stated, "There are attorney fees. I'm not sure what they are, but I'll write them on the order." As in *Dunbar*, these comments are insufficient to conclude that the trial court considered defendant's financial circumstances. Therefore, we vacate the order

requiring defendant to reimburse the county \$1,370 in attorney fees and remand for reconsideration of this issue.

Affirmed in part, vacated in part, and remanded for resentencing and for reconsideration of the order directing defendant to reimburse the county \$1,370 in attorney fees. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Kirsten Frank Kelly